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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE  
TRUSTEE IN BANKRUPTCY,  
v. *Petitioner,*

UNITED STATES OF AMERICA, ET AL.

BROTHERHOOD OF RAILWAY, AIRLINE AND  
STEAMSHIP CLERKS, FREIGHT HANDLERS,  
EXPRESS AND STATION EMPLOYEES,  
v. *Petitioner,*

UNITED STATES OF AMERICA, ET AL.

On Petitions for a Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

MEMORANDUM IN OPPOSITION

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**MEMORANDUM IN OPPOSITION \***

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At issue in this case is the validity of an order of the Interstate Commerce Commission ("ICC") that (1) dismissed the eight-year-old public convenience and necessity application of a bankrupt and liquidated carrier for

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\* This Memorandum is filed on behalf of the American Trucking Associations, Inc., ("ATA") and motor carriers that were complainants in the Commission case.

failure to prosecute, and (2) revoked a corresponding temporary authority that had been granted in 1968.

### STATEMENT

By applications filed in 1968, Railway Express Agency, Inc. ("Railway Express") sought both temporary and permanent authority from the ICC to restructure its express operations in a "Hub System." In this system, Railway Express designated 24 central points or hubs for the dispatch and receipt of traffic. The hubs were connected to each other by either motor regular-routes or rail line-haul routes. From each hub the surrounding satellite area was served by a series of motor regular-routes (Pet. App. A, p. 5a).<sup>1</sup> Upon finding that an "immediate and urgent need" existed pursuant to Section 210a(a) of the Act (49 U.S.C. § 310a(a)), the ICC, without a hearing, summarily granted Railway Express temporary authority to begin its Hub service (Pet. App. A, pp. 5a-6a).

Although Railway Express commenced temporary operations in 1968, it took no action to prosecute its corresponding hub permanent authority application. While an intention to proceed was expressed at a pre-hearing conference in January 1970, (Pet. App. A, p. 59a), no steps were ever taken to prosecute the permanent application. Instead, REA Express, Inc. ("REA"), which succeeded Railway Express in 1969, filed a subsequent application in 1971 with the ICC seeking to abandon the Hub System (Pet. App. A, p. 6a). In pleadings filed in support of its new application, REA repudiated the Hub concept and specifically advised the ICC (Pet. App. B, p. 49a) that:

for REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service.

Following denial of REA's new application in August 1971, REA never attempted to prosecute the outstanding permanent "Hub" application. Instead, it continued express operations under the temporary authority granted in 1968 until its bankruptcy and liquidation November 6, 1975 (Pet. App. A, p. 7a).

Shortly before its express operations were ceased, REA established a Rexco Division. Although Rexco ostensibly operated pursuant to REA's outstanding authorities, its operations bore no resemblance to the traditional express service performed by REA and its predecessors. Following the complete cessation of REA's express operations, several authorized carriers filed complaints with the ICC seeking to have the Rexco operations declared unlawful. Additionally, the American Trucking Associations, Inc. ("ATA") filed a petition seeking to have the outstanding "Hub" permanent authority application dismissed for want of prosecution and the corresponding temporary authority revoked (Pet. App. A, p. 8a). The ICC consolidated the complaint proceedings with the ATA petition (Pet. App. A, p. 8a).<sup>2</sup>

After a lengthy oral hearing and the filing of briefs, the entire Commission dispensed with an initial decision by the Administrative Law Judge ("ALJ"), and decided the matter on the record as certified by the ALJ. By its Order served November 19, 1977 (Pet. App. B, pp. 27a-66a), the ICC found the Rexco operations were in the

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<sup>1</sup> Except where otherwise noted, "Pet. App." refers to the appendix to the petition in No. 77-868.

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<sup>2</sup> The consolidated proceedings were embraced under ICC Docket No. MC-C-8862, Brada Miller Freight System, Inc. v. Rexco, Inc. and REA Express, Inc.

nature of "willful violations" and were "totally illegal" (Pet. App. B, p. 58a). In response to the ATA petition, the ICC found that an applicant has an affirmative duty to prosecute or seek dismissal under Rule 247(f) of the ICC's General Rules of Practice (Pet. App. B, p. 59a). Citing the eight years that REA's permanent application had been on its docket without being prosecuted, REA's repudiation of the Hub system, and REA's bankrupt and liquidated status, the ICC concluded that it must not passively burden the administrative process by failing to recognize such factors (Pet. App. B, p. 59a). It then concluded that no reason had been shown to allow the continued pendency of the unprosecuted "Hub System" permanent application, and that dismissal of the application would not be inconsistent with the public interest, the public convenience and necessity or the National Transportation Policy (Pet. App. B, p. 60a). Accordingly, the pending Hub permanent authority application was dismissed (Pet. App. B, p. 66a).

Recognizing that under its regulations (49 CFR 1101) continuation of temporary authority is conditioned upon the pendency of a corresponding application for permanent authority (Pet. App. B, p. 60a), the ICC also revoked the Hub temporary authority (Pet. App. B, p. 66a). Furthermore, the ICC determined that even if the corresponding permanent application were not dismissed, ample cause otherwise existed for the prompt revocation of the Hub temporary authority (Pet. App. B, pp. 60a-62a).<sup>3</sup> Lastly, the ICC rejected the contention raised by REA and Alltrans Express, U.S.A. ("Alltrans"),<sup>4</sup> that

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<sup>3</sup> This determination is based on the ICC's findings that, having liquidated all of its assets except its authorities (Pet. App. B, p. 50a), REA has no operational capability to perform any express service under the scope of the involved "Hub System" temporary authority, and second that REA is not fit to conduct proper and safe operations (Pet. App. B, p. 61a).

<sup>4</sup> After the close of the oral hearing in the Brada Miller complaint case, Alltrans filed an application with the ICC seeking to take over

dismissal of the permanent application and cancellation of its corresponding applications for temporary authority would amount to a severe detriment to the shipping public supposedly by depriving it of a nationwide express service to be provided by Alltrans under the REA authorities (Pet. App. B, p. 62a). As the ICC observed (Pet. App. B, pp. 62a-63a) a statutory remedy exists if an urgent need can be shown.<sup>5</sup>

By its Order served January 28, 1977, the Commission affirmed its prior decision (Pet. App. C, pp. 67a-76a). On review, the Court of Appeals affirmed the ICC's orders holding that the agency's interpretation of its rules is entitled to great deference (Pet. App. A, p. 13a) and that the substantial evidence of record supports the Commission's dismissal of the Hub permanent application on the grounds that REA did not intend to prosecute its application within the meaning of Rule 247(f) (Pet. App. A, p. 16a).

Second, the Court of Appeals held that the ICC had not abused its discretion by initially deciding the complaint case rather than Alltrans' application (Pet. App. A, pp. 17a-24a). In addition to observing that docket management is a discretionary matter as to which courts vir-

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the REA authorities, both temporary and permanent, and to substitute itself as applicant in the unprosecuted REA applications. Since all of REA's operational assets such as trucks and loading equipment had already been auctioned, Alltrans' takeover of REA involved nothing more than the purchase of REA's outstanding authorities.

<sup>5</sup> The ICC further elaborated its decision not to decide the Alltrans application before the complaint proceeding in its Order served January 28, 1977 (Pet. App. C, pp. 71a-72a) where it reasoned that to decide the Alltrans application initially would permit REA to "transfer away" redress for its breaches of the Act and the ICC's rules and regulations. Also, the ICC reasoned that since Alltrans could receive no greater interest in the involved application and temporary authority than that of REA and since the complaint proceeding involved a determination of those interests that the disposition of the complaint case properly preceded disposition of the Alltrans applications.

tually never substitute their judgment for that of an administrative agency (Pet. App. A, p. 19a), the Court also voiced its approval of the ICC's explanation for declining to permit Alltrans to substitute for REA (Pet. App. A, p. 20a).

#### ARGUMENT

Petitioners challenge the Court of Appeals' decision on several grounds, none of which has merit or warrants this Court's review.

1. Petitioners' basic contention is that the ICC's decision to dismiss REA's permanent "Hub System" application was arbitrary and an improper application of the ICC's Rule 247(f) governing failure to prosecute (Pet., pp. 8-10 and BRAC Pet., pp. 6-9). This contention was properly rejected by the Court of Appeals which, after consideration of the record, found that substantial evidence showed that not only had the Hub System permanent application gone unprosecuted for eight years by REA, but that REA, which subsequently repudiated the Hub concept, had no intention of pursuing the Hub application to a conclusion (Pet. App. A, pp. 13a-15a).<sup>\*</sup>

Petitioners' further argument (Pet. p. 9) that both the Commission and the Second Circuit have departed from the standards applicable to dismissals with prejudice ignores the above findings and is simply an attempt to have this Court substitute its judgment for that of the Commission. The Court of Appeals' decision, which recognizes the ICC's power to dismiss *sua sponte* for failure to prose-

\* The lower court further found that the ICC's interpretation of its own rule, which is entitled to great deference, was proper (Pet. App. A, pp. 16a-17a). The court specifically rejected the trustee's construction of Rule 247(f) which would limit the ICC's power to dismiss an application to those instances where the applicant had failed to comply with an order of the Commission. As the Court of Appeals correctly recognized, under the trustee's construction, the second sentence would modify and effectively repeal the first sentence of Rule 247(f) (Pet. App. A, p. 17a).

cute, is supported by this Court's holding in *Link v. Wabash Railroad Company*, 370 U.S. 626, 632-633, and needs no further consideration.

2. Petitioners' claim that the procedures followed by the ICC violated due process and the Administrative Procedure Act (Pet., pp. 10-11) is without merit. As correctly recognized by the lower court (Pet. App. A, p. 8a), the petition filed by the ATA nearly nine months prior to the start of oral hearing squarely placed REA on notice that dismissal of the Hub System permanent application and revocation of the corresponding temporary authority were the controlling issues in controversy. Petitioners' attempt to side-step the dispositive issues by alleging lack of notice with respect to certain peripheral findings of the ICC must be rejected.<sup>†</sup>

3. BRAC contends (BRAC Pet., pp. 9-11) that the ICC, contrary to the National Transportation Policy, did not weigh the impact of its decision on the former REA employees represented by BRAC. This contention is incorrect. After considering BRAC's arguments which were initially raised on reconsideration,<sup>‡</sup> the ICC concluded that they would not warrant a result different from that found by the Commission in its initial decision (Pet. App. C, p. 71a). Also as the lower court recognized (Pet. App. A, p. 24a, n. 16), BRAC, in its petition, failed "to suggest any material facts which further inquiry might have developed."

<sup>†</sup> The petitioners' treatment of the "issues" is inaccurate in several respects. Although petitioners state that the ALJ ruled that fitness was not at issue, the ALJ specifically ruled (J.A. pp. 361-362) that "[a]s far as the Commission is concerned, fitness is always an issue that the Commission itself may recognize." Furthermore, since REA had already been liquidated at the time of the hearing, its inability to prove either financial or operational capability was not a contested issue.

<sup>‡</sup> Although BRAC was aware of the proceedings before the ICC it did not intervene in the complaint proceeding until after the ICC issued its initial decision.

BRAC also suggests (BRAC Pet. p. 9) that the ICC's decision is contrary to the maintenance of an uninterrupted and efficient transportation system. This suggestion, however, fails to recognize that REA's express operations had been voluntarily halted by REA and all BRAC employees terminated prior to the commencement of the proceedings before the ICC.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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